THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Docket No. 08-E-0053

In the Matter of the Liquidation of
Noble Trust Company

LIQUIDATOR'S MEMORANDUM IN SUPPORT OF PROPOSED PLAN OF LIQUIDATION AND MOTION FOR APPROVAL OF CLAIMS RESOLUTION PROCEDURES

Glenn A. Perlow, Bank Commissioner for the State of New Hampshire, in his capacity as Liquidator (the "Liquidator") of Noble Trust Company ("Noble Trust") and Aegean Scotia Holdings, LLC ("Aegean Scotia"), by his attorneys, the Office of the Attorney General and Sheehan Phinney Bass + Green, Professional Association, submits this memorandum in support of the Liquidator's proposed Plan of Liquidation dated August 7, 2014 (the "Plan") and Liquidator's Motion for Approval of Claims Resolution Procedures dated August 7, 2014 (the "Claims Procedures Motion").

Preliminary Statement

This proceeding is a statutory proceeding for the liquidation of a non-depository trust company brought by the Bank Commissioner for the State of New Hampshire pursuant to RSA 395:1 *et seq.* During the course of his investigation, the Liquidator concluded that, in its early days, Noble Trust invested a substantial portion of its clients' money in a Ponzi scheme. In order to hide its losses from its clients and regulators, Noble Trust itself became a Ponzi scheme. In such cases, the courts have consistently held that receivers in equity such as the Liquidator possess very broad powers and wide discretion to fashion equitable remedies in determining to whom and how the assets of the liquidation estate will be distributed. These equitable principles, coupled with the applicable provisions of RSA 395 and the Court's equitable powers granted by RSA 498:1, provide the framework upon which the Plan and Claims Procedure Motion are based.

Background

1. In 2003, Noble Trust was organized and chartered under the laws of the State of New Hampshire as a non-depository banking corporation, and subject to regulation by the New Hampshire Banking Department (the "Banking Department").

2. As a result of irregularities discovered by the Banking Department's 2008 examination of Noble Trust, on February 11, 2008, Commissioner Peter Hildreth commenced a liquidation proceeding by filing a Verified Petition for Liquidation (the "Liquidation Petition") in this Court, seeking the appointment of a liquidator for Noble Trust pursuant to RSA 395:1, as well as related injunctive relief against Noble Trust pending the Court's ruling on the Liquidation Petition (the "Liquidation Proceeding").

3. On March 27, 2008, this Court entered an order (the "Liquidation Order") appointing Commissioner Hildreth as liquidator of both Noble Trust and its parent company, Aegean Scotia. The Liquidator is the duly appointed successor liquidator of Noble Trust and Aegean Scotia by order of this Court dated February 1, 2013.

4. Colin P. Lindsey ("Lindsey") was the president of Noble Trust and chairman of its board of directors, and he also was an owner of Aegean Scotia. During the course of its business, Noble Trust solicited and received funds from both new and existing clients. Noble Trust's clients' funds were deposited into individual management accounts or individual retirement accounts established for the benefit of those clients, or in charitable trusts for which Noble Trust clients were both the grantors and beneficiaries during their lives.

5. Lindsey also served as president or managing member of Balcarres Group, LLC ("Balcarres"),[1] a Nevada limited liability company. Both Lindsey and Balcarres were licensed by the New Hampshire Insurance Department and acted as insurance brokers in procuring insurance policies for the benefit of Noble Trust's clients.

6. The Liquidator's investigation has revealed that Noble Trust was undercapitalized and insolvent from its inception. See Affidavit of Robert A. Fleury in Support of Liquidator's Memorandum in Support of Proposed Plan of Liquidation and Motion for Approval of Claims Resolution Procedures (the "Fleury Affidavit") at ¶8. Although Noble Trust's books showed the source of its starting capital was money loaned from its parent, Aegean Scotia, the money was actually taken from certain trusts of which an entity known as the Children's Community Foundation ("CCF") was the trustee. Id. Those funds were transferred from these CCF clients' accounts to Aegean Scotia, Noble Trust's parent company, which in turn, "loaned" the money to Noble Trust, its wholly-owned subsidiary. Lindsey was the Executive Director of CCF. Id.

7. When Noble Trust was chartered, many, but not all of CCF's clients became clients of Noble Trust. Initially, this was accomplished when Lindsey, as Executive Director of CCF, signed account administration agreements with Noble Trust. Fleury Affidavit at ¶9. Lindsey, as Executive Director of CCF, later appointed Noble Trust as co-trustee of certain accounts of which CCF was the trustee. Id.

8. Between June 2004 and September 2007, Noble Trust (acting as a trustee under its clients' trusts) invested approximately $15 million in an entity known as Sierra Factoring, LLC ("Sierra"). Fleury Affidavit at ¶10. Based upon information available to the Liquidator, the

[1] Pursuant to this Court's Order dated November 13, 2009, the assets of Balcarres were declared to be property of the Liquidation Proceeding.

$15 million investment in Sierra became substantially or entirely worthless, a fact that Lindsey did not disclose to the Banking Department or other state authorities or Noble Trust's clients. Id.

9. Instead, Lindsey attempted to conceal the loss from Noble Trust's clients and other parties in interest (including the Banking Department). Fleury Affidavit at ¶11. The Liquidator's examination of Noble Trust's cash flow has shown that most distributions made to Noble Trust customers that purported to be interest earned on investments in Sierra actually came either from the funds of other clients or from commissions Lindsey and Balcarres earned on the issuance of certain predominantly fraudulent life insurance policies for elderly insureds with face values generally between $3 million and $10 million. Id. Similarly, clients who closed their accounts throughout most of Noble Trust's history were able to do so only by virtue of such funds. Id.

10. As a non-depository trust company, Noble Trust had clients with which it had a variety of relationships. Fleury Affidavit at ¶12. In some cases, Noble Trust was trustee; in others, it served as an investment advisor, trust administrator, trust protector, or in another similar fiduciary capacity. Id. Commingling of assets of Noble Trust clients was common to most, if not all, of these relationships. In addition, customers from all of these relationships were similarly situated with respect to their relationship to the ongoing fraud at Noble Trust. Id.

Summary of Plan and Claims Resolution Procedures

11. Since early in this proceeding, the Liquidator has engaged in negotiations with numerous parties to resolve various disputes concerning assets of the liquidation estate. The negotiations have resulted in settlement agreements that have been approved by this Court and, in turn, the collection by the Liquidator of settlement sums for future distributions on account of

allowed claims. Accordingly, the Liquidator has filed the Plan and the Claims Resolution Procedures to ensure an orderly and efficient liquidation for the benefit of creditors.

A. Summary of Plan[2]

12. The Plan follows principles common to the liquidation of entities victimized by Ponzi schemes. Specifically, the Plan provides for the pooling of all assets and proceeds in the liquidation estate into a common fund, from which allowed claims will be paid based upon the statutory priorities for distributions established by New Hampshire law for depository institutions under RSA 395:30.

13. The Plan does not allow any client or creditor to claim title to any specific asset. As the Sierra Ponzi scheme unraveled and Noble Trust conducted its own schemes to cover-up losses, Lindsey disregarded his fiduciary responsibilities with respect to individual accounts and used assets in those accounts as necessary to conceal clients' losses. The use of client omnibus accounts to process cash transactions, some of which records are not even available to the Liquidator, also makes tracing how clients' cash was actually used impossible. In addition, liquidation plans in Ponzi cases are based on the premise that anything other than a pro rata distribution of available assets is inequitable. Thus, the Plan calls for all Noble Trust's clients to share pro rata in the pool of cash and noncash assets available for distribution (taking into account the amount that a client already received from Noble Trust), and rejects an approach that would require the Liquidator to attempt to trace the actual use of cash and noncash assets administered by Noble Trust on an account by account basis.

[2] Notwithstanding the recitation in this Memorandum of the terms of the Plan, this is a summary only and all parties in interest are urged to read the Plan. In the event of any conflicts or inconsistencies between the summary contained in this Memorandum and the terms of the Plan, the terms of the Plan shall control.

14. As is also common in Ponzi cases in which noncash assets are addressed, all noncash assets held by Noble Trust in custodial accounts, trust accounts, or in some other fiduciary relationship to Noble Trust's clients, are treated no differently than cash. Many of the noncash assets that are part of the liquidation estate are still in their original form only because of an accident of time. When Noble Trust did not have enough cash to fulfill a customer's demands to close its account or expectations of earning a certain return on their investment, or to pay premiums on insurance policies entered into to generate commissions, Lindsey sometimes caused Noble Trust to liquidate another client's noncash assets to generate the necessary cash, thereby enabling Lindsey to continue the Noble Trust scheme. Noble Trust's charitable trust clients put noncash assets into a charitable trust prior to their sale as a means of avoiding a capital gains tax when the asset was sold. Thus, the intention from the outset with respect to these assets was that they would be turned into cash. The fact that some assets remained in an identifiable noncash form while others did not was in large part a function of the point at which the Department stepped in and halted the Ponzi scheme. To allow any particular client or creditor to retain title to in-kind property that Noble Trust may still hold would inequitably allow some investors to recoup 100% of their investments while reducing or altogether eliminating any recovery for other similarly defrauded clients. To avoid such resulting inequity, the Plan pools even those limited noncash assets in which Noble Trust holds an interest but which might still be traceable to a specific client.

15. RSA 395 addresses the distribution of assets in the liquidation of a depository institution. RSA 395:30. It provides for priority in the payment of dividends to creditors pursuant to RSA 395:19 and other proceeds of property of the insolvent "depository institution." Id. Its order provides as follows:

- Costs of the liquidation
- Employee claims
- Depositor claims
- Liens accorded priority under New Hampshire law
- Certain consumer deposits related to mortgage transactions
- Non-priority claims
- Late filed claims
- Capital debentures and other "expressly subordinated" claims
- Stockholders

16. As a non-depository trust company, Noble Trust had clients with which it had a variety of relationships, none of which includes depositors. Fleury Affidavit at ¶17. This fact, together with the fact that the statute does not specifically address the treatment of clients of a non-depository trust company makes the application of the depository distribution scheme difficult. The Liquidator does not believe that any valid or allowable depositor, priority lien, or consumer deposit claims exist and believes that any employee claims that do exist are either invalid or should be subordinated. Id. Claims against Noble Trust, including those of clients are generally non-priority claims. The Liquidator believes that clients of a non-depository institution such as Noble Trust, which received trust, fiduciary, investment management, trust administration, trust protection, or other similar services, are analogous to depositors in a depository institution, and, in equity, should be ranked ahead of other non-priority claims. Id.

17. Consistent with the intent of the distribution priorities expressed in RSA 395:30, principles of equity, and the Liquidator's equitable powers, all Claims against Noble Trust are divided under the Plan into seven classes:

- Class One: Administration Costs – the costs and expenses incurred in connection with the liquidation of the Estates.

- Class Two: Employee Claims – wage, salary and other Claims of Noble Trust employees, to the same extent that such Claims would be accorded priority under the applicable provisions of the United States Bankruptcy Code (the "Bankruptcy Code"). To the extent not otherwise subordinated or disallowed, any Claim held by a Noble

Trust employee in excess of the amount entitled to priority under the Bankruptcy Code shall be treated as a Class Five (C) Claim.

- Class Three: Deposit Claims – the Liquidator does not anticipate any Claims for "deposits" within the meaning of RSA 395:30 (III).

- Class Four: Lien Claims – claims secured by valid, perfected, unavoidable statutory liens accorded priority under New Hampshire law, but not by contractual security interests.

- Class Five: All other Claims. Class Five consists of the following subclasses:

  (A): Client Account Claims – claims for the recovery of property administered by the Liquidator that are asserted by a person or entity for whom Noble Trust was obligated to render trust, fiduciary, investment management, trust administration, trust protector or other similar services arising from the delivery to or administration by Noble Trust of any real or personal property for the direct or indirect benefit of such person.

  (B): General Unsecured Claims, but excluding Claims in the junior classes described below.

  (C): Claims held by Insurers arising from Insurance Policies issued to or for the direct or indirect benefit of Client(s).

- Class Six: Delayed Claims – claims determined to be not timely filed in the Liquidation Proceeding.

- Class Seven: Subordinated Claims – claims determined by the Liquidation Court either under applicable law (including principles of equitable subordination), or in accordance with agreements between the Liquidator and the holder of a Claim in any of the above classes, to be entitled to a subordinated priority of Distributions under the Plan.

18. For the Client Account Claims, the Plan calls for distributions to be made according to the "rising tide" method rather than by reference to what were generally inaccurate client account statements, in order to accomplish the greatest equity possible for the largest number of claimants by equalizing their recoveries. These account statements often added in an amount for interest earned even though, in most instances, these accounts were not earning

interest at all, and often included unsupported and exaggerated assertions of purported account values.

19. As in any Ponzi scheme where investors are paid from a pool of commingled funds, some Noble Trust clients received all or a significant portion of their principal back prior to the liquidation, while others received little or none of theirs. The essential objective of the "rising tide" method is to return money first to those clients who did not receive as much money—measured as a percentage of their principal—as other clients did during the course of Noble Trust's operations. Once these similarly situated clients "catch up" to clients who previously received greater percentages of their principal, all clients share in any remaining distributions on a *pro rata* basis. In deciding to adopt the rising tide approach, the Liquidator considered and rejected certain other methods by which distributions are sometimes made in Ponzi cases, either because they favor earlier investors or because they are too cumbersome and likely to result in an undue delay in administering the Estates' assets and distributing money to Noble Trust's clients and other creditors. Fleury Affidavit at ¶20.

20. The Plan calls for the calculation of Client Account Claims by first verifying the amount of investment put into an account at Noble Trust through bank statements and/or records. If a noncash asset was placed in the account, the Liquidator will use his best efforts to determine the fair market value of such asset at the time the account was established. For an account that was created under the auspices of CCF and predates Noble Trust's charter, the Plan values the account at the time that Noble Trust first became trustee, trust administrator, account administrator, or investment advisor for this account. Interest is treated as an addition to the amount invested only in those instances when Noble Trust received a cash payment representing a true return on investment. Any amount distributed to an individual is treated as a return of a

portion of the amount invested. A calculation is then performed to determine what percentage of a client's investment has already been returned and what percentage was lost.

21. Pro rata distributions on account of claims classes 5(B), 5(C), 6 and 7 will be made only when the claims in the preceding classes have been paid in full (or an adequate reserve exists).

B. Summary of Claims Resolution Procedures[3]

22. The New Hampshire statute provides only a basic framework for the determination of claims in bank liquidations. Upon notice, claimants are to file proofs of claim on or before the claim filing deadline. RSA 395:13. The Liquidator is to review all claims duly filed and may reject claims that he doubts the justice and validity of and mail written notice of such rejection to the claimants. See RSA 395:14. An action on a rejected claim shall not be entertained unless brought within six months after service of the notice of rejection. RSA 395:15. Prior to making any distributions, the Liquidator is to supply a list of the claims presented, including and specifying the claims rejected by him. RSA 395:18. Objections to claims not rejected by the Liquidator may be made by any person interested by filing a copy of the objection with the Liquidator, who shall present the objection to the Court prior to the next declaration of a dividend, and the Court shall notify the claimant and determine the validity of the claim. RSA 395:21.

23. In light of the number of claims that have been filed, and the potential for significant number of disputed claims that may ultimately need to be decided by the Court, the Liquidator submits that it is desirable to establish more detailed procedures regarding claims, in

[3] Notwithstanding the recitation in this Memorandum of the terms of the Claims Resolution Procedures, this is a summary only and all parties in interest are urged to read the Claims Resolution Procedures. In the event of any conflicts or inconsistencies between the summary contained in this Memorandum and the terms of the Claims Resolution Procedures, the terms of the Claims Resolution Procedures shall control.

particular to provide uniform processes for the orderly determination of disputed claims while allowing for claims of varying complexity. Consistent with due process of law, such procedures will provide claimants and the Liquidator, as well as any other directly affected persons, with a framework in which to resolve disputes that will reduce procedural issues and provide for the more efficient and economical determination of claims.

24. The Liquidator has filed the Claims Procedures Motion with an accompanying proposed Order Establishing Claims Resolution Procedures (the "Claims Resolutions Procedures"). The purpose of the Claims Resolution Procedures is to achieve uniformity and to provide procedures for the presentation, processing, determination and classification of claims and to assist all Claimants in the orderly presentation of their claims in the Liquidation Proceeding.

25. The Claims Resolution Procedures fills out the basic statutory framework described above by providing procedures for the following:

a. Filing of Claims. The Liquidator previously established August 10, 2008 as the deadline by which proof of all claims must be filed with the Liquidator, in the form of the Proof of Claim provided by the Liquidator.[4] Claims Resolution Procedures § 4.1. The Claims Resolution Procedures make clear that the Liquidator is authorized to require supplementary information. Claims Resolution Procedures § 4.2.

b. Determination of Claims. The Claims Resolution Procedures provide for the Liquidator to review all claims duly filed in the Liquidation and shall make such

[4] Notice of the deadline was provided by direct mailing of the Court approved form of Proof of Claim and Instructions to all known clients, creditors, and vendors of Noble Trust and/or Aegean Scotia. The Liquidator also arranged for Notice of the Proof of Claim deadline to be published weekly for three consecutive weeks in the Manchester Union Leader and the Kansas City Star. The Liquidator has also made the claim forms available on the Noble Trust Liquidation website.

further investigation as he deems necessary. The Liquidator may compound, compromise or in any other manner negotiate the amount for which claims will be recommended to the Court. The Liquidator shall enter a determination, which shall either (1) allow the claim in whole or in part and classify the amount and priority of the allowed claim or (2) disallow the claim in whole. A determination that disallows a claim shall be deemed a "rejection" of the claim within the meaning of RSA 395:14. Claims Resolution Procedures § 5.1. The Liquidator will then mail a Notice of Determination to the claimant. Claims Resolution Procedures § 5.2. The claimant may (but need not) request reconsideration of the determination by the Liquidator by filing a Request for Review with the Liquidator within twenty-eight (28) days of the date on which the Notice of Determination was mailed to the claimant, in which case the Liquidator will review the claim and issue a Notice of Redetermination. Claims Resolution Procedures § 6. An interested party may submit an objection to any Claim not rejected by the Liquidator by filing a copy of such objection with the Liquidator, who shall present the objection to the Court before making any subsequent distributions under the Plan. Claims Resolution Procedures § 5.4. The Court shall notify the Claimant of the objection and determine the validity of the Claim. Id.

c. Objection to Denial of Claims. The Claims Resolution Procedures require the claimant to file an objection with the Court within six (6) months from the mailing of the notice. The Claimant shall mail a copy of the Objection to the Liquidator. If no timely Objection is filed, the Claimant may not further object to the Determination, which shall be final and binding upon the Claimant with respect to all claims that are the subject of the Determination. Claims Resolution Procedures § 7.

d. Resolution of Disputed Claims. When a Claimant files a timely Objection, the Liquidation Court shall mail a Notice of Disputed Claim to the Claimant, with a copy to the Liquidator to initiate the Disputed Claim proceeding. The Liquidator and the Claimant are the only persons who shall be considered parties to the Disputed Claim proceeding. Claims Resolution Procedures § 8.1. The Claims Resolution Procedures provide for service of filings. Claims Resolution Procedures § 8.2.

e. Expedited Procedures for "Small Claims." "Small Claims" – defined as any claim with an asserted value of less than $50,000 – may be set for an immediate pre-hearing conference to attempt to resolve such Small Claims at which the Court may issue a final determination. Claims Resolution Procedures § 9.

f. Orderly Procedures for Other Claims. Other claims will be the subject of a Structuring Conference before the Court in accordance with N.H. Super. Ct. R. 5. Claims Resolution Procedures § 11. Claim disputes will be conducted based on the written submissions and oral argument of the participants, unless a request for an evidentiary hearing is made and granted. Claims Resolution Procedures § 11.1. Written submissions will be filed in accordance with the schedule set forth in the Claims Resolution Procedures (or as determined in the Structuring Conference Order). Claims Resolution Procedures § 11.1. If an evidentiary hearing is granted, the hearing shall be conducted in accordance with the New Hampshire Superior Court Rules and New Hampshire Court practice. Claims Resolution Procedures § 12.1.

26. The Liquidator submits that the Claims Resolution Procedures provide appropriate processes for the determination of claims that will assist in achieving a more uniform, efficient and economical resolution of claims in the Liquidation Proceeding, while at

the same time conserving judicial resources and satisfying due process. Similar procedures have been adopted by this Court In re Liquidation of the Home Ins. Co., Case No. 03-E-0106 and 03-E-0112.[5]

Law in Support of Plan

27. In order to adequately address the factors unique to the Liquidation Proceeding and establish an equitable distribution scheme, the Liquidator has filed the Plan.

I. This Court Has the Equitable Power to Approve the Plan

28. This Court has the power to enter an order approving the Plan. The Court has the powers of a court of equity. RSA 498:1. As such, it has "broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation." Boynton v. Figueroa, 154 N.H. 592, 608 (2006)(citations omitted). The power of courts in equity and, in particular, with insolvent estates, are "invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." Pepper v. Litton, 308 U.S. 295, 305 (1939). In bank liquidation cases such as this one, the Court's equity powers are no less expansive. See RSA 395:2 (court may issue orders as equity may require). Absent approval of the Plan and, in connection therewith, the Claims Resolution Procedures, the Liquidator will likely be required to move the case forward by motion practice, which may result in delays and lacks the structure needed for dealing with the complexity surrounding the liquidation of Noble Trust. In short, the Liquidator views the Plan and Claims Resolution Procedures to be the most reasonable, expedient and equitable path forward.

[5] http://www.hicilclerk.org/Hicil.nsf/vwAllOtherDocs?ReadForm&Court+Orders

29. Courts under analogous circumstances involving Ponzi schemes have held that under general equitable powers receivership courts have the authority to adopt liquidation plans. See, e.g., SEC v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992) (court "has broad powers and wide discretion to determine relief in an equity receivership … derive[ed] from the inherent powers of an equity court to fashion relief."); SEC v. Byers, 637 F. Supp. 2d 166, 175 (S.D.N.Y. 2009) (court has authority to approve a liquidation plan derived from its broad powers to fashion relief in equity).

30. Accordingly, this Court has the equitable power to approve the Plan.

II. Pooling of Assets to Accomplish Ratable Distribution is Fair and Equitable

31. Courts in Ponzi scheme cases uniformly endorse the pooling of assets and pro rata distribution where "the funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders." Kathy Bazoian Phelps & Steven Rhodes, The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes § 6.05[1][b] (2012) (quoting SEC v. Credit Bancorp, Ltd., 290 F.3d 80, 88-89 (2d Cir. 2002)); see also Cunningham v. Brown, 265 U.S. 1, 13 (1924); U.S. v. Durham, 86 F.3d 70, 72 (5th Cir. 1996); Hirsch v. Arthur Anderson & Co., 72 F.3d 1085, 1088 n.3 (2d Cir. 1995); Elliott, 953 F.2d at 1569; Byers, 637 F.Supp.2d at 179-80; Jobin v. Youth Benefits Unlimited (In re M&L Bus. Mach. Co.), 164 B.R. 148, 151 (D. Colo. 1994); Gaffney v. Rubino (In re Builders Capital & Servs., Inc.), 317 B.R. 603, 611 (Bankr. W.D.N.Y. 2004); Henderson v. Allred (In re W. World Funding, Inc.), 54 B.R. 470, 475-76 (Bankr. D. Nev. 1985). Courts have deemed these equitable principles "especially appropriate for fraud victims of a 'Ponzi scheme' . . . . In such a scheme, whether at any given moment a particular customers' assets are traceable is 'a result of the merely fortuitous fact that the defrauders spent the money of other victims first.'" Credit

Bancorp, 290 F.3d at 89 (internal citations omitted). Such cases "call strongly for the principle that equality is equity . . . ." Cunningham, 265 U.S. at 13.

32. Courts in Ponzi scheme liquidations and receiverships have applied the principle of pooling even where a claimant can identify its asset among the property of the estate. For instance, in SEC v. Elliott, investors in a Ponzi scheme transferred identifiable securities to the Ponzi perpetrator. Prior to the receivership, the perpetrator sold some, but not all, of the securities. The investors objected to the pooling and ratable distribution of their identifiable securities, but the trial court approved the receiver's plan and the Eleventh Circuit affirmed, holding that:

> These investor/appellants are attempting to recover the securities that Elliott retained with their names on them. Legally, these investors occupy the same position as the other investors whose securities were sold. All investors were defrauded. All investors were cleverly persuaded to part with their securities. . . . "To allow any individual to elevate his position over that of other investors similarly 'victimized' by asserting claims for . . . reclamation of specific assets . . . would create inequitable results, in that certain investors would recoup 100% of their investment while others would receive substantially less. . . . [I]n the context of this receivership the remedy . . . to trace and reclaim specific assets . . . is disallowed as an inappropriate equitable remedy." We cannot say that the district court abused its discretion . . . . A district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership. . . . [S]ince these creditors occupied the same legal position as other creditors, equity would not permit them a preference; for "equality is equity."

Elliott, 953 F.2d at 1569-70 (internal citations omitted). Similarly, in Credit Bancorp, the Second Circuit considered "whether shares of stock transferred to a company that defrauded the transferor and numerous other victims can be included in the receivership estate of the defrauding company for purposes of a *pro rata* distribution to the defrauded victims." Credit Bancorp, 290 F.3d at 82. The court noted that the particular investor's "claim is distinguishable from that of many of CBL's customers only in that the eight million Vintage Petroleum shares it deposited were not converted into cash and are currently being held in CBL's brokerage accounts." Id. at 85. The court then rejected the investor's arguments for reclamation and affirmed the district court's distribution scheme:

> [W]hatever . . . interest [the investor] might have in the . . . shares . . . does not defeat the equitable authority of the District Court to treat all the fraud victims alike . . . and order a *pro rata* distribution. Courts have favored *pro rata* distribution of assets where, as here, the funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders. . . .

Id. at 89 (internal citations omitted).

III. The Rising Tide Methodology Provides the Most Equitable Distribution to the Claimants

33. It is well-settled that courts have broad powers and are afforded wide discretion in approving a distribution plan of receivership funds. SEC v. Forex Asset Mgmt., 242 F.3d 325, 331 (5th Cir. 2001) (affirming pro-rata distribution plan because it was a "logical way to divide the money"). In approving a distribution plan of receivership assets, the court, "acting as a court of equity, [is] afforded the discretion to determine the most equitable remedy." Id. at 332; SEC v. Enterprise Trust Co., 559 F.3d 649, 652 (7th Cir. 2009) ("District judges possess discretion to classify victims sensibly in receivership proceedings."); Elliott, 953 F.2d at 1566; McFarland v. Winnebago S., Inc., 863 F. Supp. 1025, 1034 (W.D. Mo. 1994) ("A federal district court presiding over an equity receivership has extremely broad power to supervise the receivership and protect receivership assets.").

34. The "primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986). In cases involving securities or investor fraud, the purpose of

the receivership is to prevent further dissipation of the assets belonging to defrauded investors. See SEC v. Wencke, 783 F.2d 829, 837 (9th Cir. 1986).

35. As recognized by the Seventh Circuit in Enterprise Trust Co., in which the court affirmed the district court's approval of a receiver's distribution plan in an investor fraud scenario, individuals whose property is marshaled by a receiver and whose claims are resolved in the receivership proceedings are "like creditors of a debtor in bankruptcy, [and] must accept the distribution that the court believes appropriate." Enterprise Trust Co., 559 F.3d at 652. Thus, the guiding principle that emerges from case law is that any distribution should be done equitably and fairly, with similarly-situated investors or customers treated alike. See SEC v. Wang, 944 F.2d 80, 84-85 (2d Cir. 1991).

36. "Courts have favored pro rata distribution of assets where...the funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders." SEC v. Amerifirst Funding, Inc., No. 3:07-CV-1188-D, 2008 WL 919546, at *3 (N.D. Tex. March 13, 2008) (citing Credit Bancorp, 290 F.3d at 88-89. Equity and fairness demand that all investors share equally in the fund of pooled assets. SEC v. Capital Consultants, LLC, 397 F.3d 733, 738-39 (9th Cir. 2005); Cunningham, 265 U.S. at 1 (approving pro-rata distribution of commingled funds obtained through illegal scheme perpetrated by Charles Ponzi).

37. Courts have also recognized that "where the assets of the receivership estate are insufficient to afford full recovery to all victims, any given plan is likely to be viewed more favorably by certain victims than others depending on how they fare under that plan...an equitable plan is not necessarily a plan that everyone will like." SEC v. Credit Bancorp, No. 99 CIV. 11395 RWS, 2000 WL 1752979, at *29 (S.D.N.Y. November 29, 2000); see also SEC v.

TLC Inv. and Trade Co., 147 F. Supp. 2d 1031, 1041-42 (C.D. Cal. 2001) ("In any situation in which the pie is limited, each individual desiring a slice of that pie is, in a sense, adverse to others also wanting a slice of the pie.").

38. Because the Liquidator seeks the most equitable result and treatment of claimants, the Court may give weight to the Liquidator's "judgment of the most fair and equitable method of distribution." CFTC v. Eustace, No. 05-2973, 2008 WL 471574, at *5 (E.D. Pa. February 19, 2008) (approving receiver's *pro-rata* distribution plan and recognizing that the receiver does not represent a particular group of investors or claimants but rather proposes a plan that is fair to all investors); see also U.S. v. Peters, 2011 WL 281031 (D. Minn. January 25, 2011); Byers, 637 F.Supp.2d at 175.

39. Under the facts of this case, the Liquidator recommends and proposes that a *pro rata* distribution based on a "rising tide" methodology is the most equitable method of disbursing Liquidation funds to the eligible defrauded claimants. Courts elsewhere have previously recognized the "rising tide" method of distribution as the most equitable method for which to distribute receivership assets to defrauded claimants. CFTC v. Lake Shore Asset Mgmt., No. 07 C 3598, 2010 WL 960362, at *9-10 (N.D. Ill. March 15, 2010) ("the court agrees with the receiver that the 'Rising Tide' method is the most equitable because it prevents an investor who previously received funds as withdrawals from benefitting at the expense of other investors by retaining the benefit of the full amount of his withdrawal *plus* a distribution calculated on the basis of net funds invested, rather than the recommended distribution amount adjusted to take into account all amounts already received.") (internal quotation marks omitted); CFTC v. Hoffberg, No. 93-C-3106, 1993 WL 441984, at *2 (N.D. Ill. October 28, 1993) (granting a receiver's motion for initial distribution in investment scheme case using

the exact formula proposed by the receiver in the instant case); CFTC v. Skorupskas, 1988 U.S, Dist. LEXIS 18649, at *5-7 (E.D. Mich. August 22, 1988); U.S. v. Cabe, 311 F. Supp. 2d 501, 509-10 (D.S.C. 2003); CFTC v. Equity Financial Group, LLC, No. Civ. 04-1512 RBK AMD, 2005 WL 2143975, at *5 (D. N.J. September 2, 2005) (granting a receiver's proposed interim distribution plan that went to investors using a *pro-rata* multiplier of 38%).

40. Under the "rising tide" method, claimants are allowed to retain previously received principal funds, but those funds are credited against a claimant's respective pro-rata share based on the full amount of their investment. Id. at *24. Thus, under the "rising tide" method, only claimants who previously received funds in an amount less than their respective pro-rata distribution amount will receive additional funds. Id. Claimants who previously received an amount in excess of their respective pro-rata share would not receive any additional funds as part of the Liquidator's Plan until all similarly situated claimants have received their pro-rata share. Id. Claimants who previously received an amount not in excess of their respective pro-rata share will only receive an amount to bring them up to their pro-rata share. Consistent with the Liquidator's Plan and formula described above, once all claimants "catch-up" and are essentially equalized, subsequent distributions are shared among all claimants on a pro rata basis.

41. Other courts have adopted the "net investment" methodology in fixing the amount of investor claims. The net investment method credits the amount of cash deposited by the customer into his or her account and deducts any amounts withdrawn from it. The Liquidator considered this methodology and rejected it because it would result in certain investors receiving back more than such investor's proportionate share of investments. The following example

illustrates the inequity that can result from the application of the net investment method as compared to the rising tide method:

> Assume three investors lose money in a Ponzi scheme. Each invested $150,000. A withdrew $60,000 before the scheme collapsed; B withdrew $30,000; C made no withdrawals, for total losses of $360,000. Assume receiver has $60,000 to distribute. Under the net investment method, each investor would receive one-sixth of his losses: A gets $15,000; B gets $20,000; C gets $25,000. As a result, A recovered a total of $75,000; B recovered a total of $50,000; and C recovered $25,000. In contrast, under the rising tide method, withdrawals are considered part of the distribution received by an investor and so are subtracted from the amount of receivership assets to which he would be entitled if there had been no withdrawals. In this example, then, for the "tide" to raise B and C as close to A as possible, B has to recover $15,000 in receiver assets, and C has to recover the remaining $45,000, so that the division among the three investors is 60-45-45 under this method. A does not receive a distribution until B and C have obtained the same recovery, at which point all three investors share pro rata in any subsequent distributions.

Example[6]

Investor	Investment	Pre-Liquidation Withdrawals	Loss
A	$150,000	$60,000	$90,000
B	$150,000	$30,000	$120,000
C	$150,000	$0	$150,000

Distribution of Estate Assets ($60,000)

Net Investment Method

Investor	Distribution	Total Recovery	Percentage of Recovery
A	$15,000	$75,000	50%
B	$20,000	$50,000	33%
C	$25,000	$25,000	17%

Rising Tide Method

Investor	Distribution	Total Recovery	Percentage of Recovery
A	$0	$60,000	40%
B	$15,000	$45,000	30%
C	$45,000	$45,000	30%

42. Based upon the Liquidator's detailed analysis of the circumstances of this case, and seeking to balance the positions of those claimants that received pre-Liquidation payments/withdrawals from Noble Trust with those claimants that did not, the Liquidator believes that the "rising tide" method is the most equitable approach in this instance and therefore recommends its application in calculating the distributions under the Plan. Lake Shore Asset Mgmt., 2010 WL 960362, at *9-10; Hoffberg, 1993 WL 441984, at *2.

[6] These charts are supplied for illustrative purposes only.

Objections and Notice of Hearing on Plan Approval
and Approval of Claims Resolution Procedures

43. Objections to the Plan and/or the Claims Procedures Motion, if any, must be in writing and filed with the Clerk of the Court (Office of the Clerk, Merrimack County Superior Court, 163 North Main Street, Concord, New Hampshire, 03302), and served upon the following parties so as to be actually received on or before the September 10, 2014 at 4:00 p.m. deadline imposed by the Court; *i.e.* any objections filed with the Court must also be either hand delivered to counsel or, if served by mail, then also transmitted electronically to the Liquidator's counsel that same day:

Christopher M. Candon Sheehan Phinney Bass + Green, PA P.O. Box 3701 Manchester, NH 03105-3701 ccandon@sheehan.com Fax: (603) 641-8768	Peter C.L. Roth Senior Asst. Attorney General Office of the Attorney General 33 Capitol Street Concord, NH 03301-6397 peter.roth@doj.nh.gov Fax: (603) 223-6269

Objections not filed and served in accordance with this paragraph shall not be considered.

44. On October 7, 2014 at 1:30 p.m., prevailing Eastern time, or as soon thereafter as counsel may be heard, a hearing will be held at the Merrimack County Superior Court, 163 North Main Street, Concord, New Hampshire, 03302, to consider approval of the Plan and approval of the Claims Procedures Motion. The hearing may be adjourned from time to time by announcement in open Court at the first scheduled hearing or at adjourned hearings without further written notice to parties in interest. The hearing will be a non-evidentiary hearing and no prehearing discovery will be afforded.

Conclusion

For the reasons stated herein, the Liquidator requests that the Court (i) enter an order, in substantially the same form submitted herewith as Exhibit A, approving the Plan, (ii) enter an order, in substantially the same form submitted with the Claims Procedures Motion, establishing the Claims Resolution Procedures, and (iii) grant the Liquidator such other and further relief as is just.

Respectfully submitted,

Dated: August 7, 2014

GLENN A. PERLOW, BANK COMMISSIONER
OF THE STATE OF NEW HAMPSHIRE,
AS LIQUIDATOR OF NOBLE TRUST COMPANY

By his attorneys,

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EXHIBIT A

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Docket No. 08-E-0053

In the Matter of the Liquidation of
Noble Trust Company

ORDER APPROVING AMENDED PLAN OF LIQUIDATION

Glenn A. Perlow, Bank Commissioner of the State of New Hampshire, in his capacity as the Liquidator (the "Liquidator") of Noble Trust Company ("Noble Trust") and Aegean Scotia Holdings, LLC ("Aegean Scotia") having filed with this Court the Amended Plan of Liquidation dated August 7, 2014 (the "Plan"); this Court having reviewed the Liquidator's Memorandum in Support of Proposed Plan of Liquidation and Motion for Approval of Claims Resolution Procedures and the Affidavit of Robert A. Fleury in Support of Proposed Plan of Liquidation and Motion for Approval of Claims Resolution Procedures; the Plan and notice of the deadline for objecting to the Plan and of the hearing to consider approval of the Plan having been given and served upon all creditors and other interested persons entitled thereto as evidenced by the Certificates of Service submitted by the Liquidator; there being no objections to the Plan or any objections having been resolved or overruled; the Court being otherwise fully advised in the premises and having held a hearing on October 7, 2014 to consider the approval of the Plan (the "Hearing"); and, based upon the record at such Hearing and throughout this case, after due deliberation and sufficient cause appearing therefor,

THE COURT HEREBY FINDS AND RULES that:

A. Due, sufficient and adequate notice of the Plan and the Hearing, together with the deadline for filing objections to the Plan, has been given to all known holders of claims and/or interests and all other parties entitled thereto. The Liquidator has complied with all applicable requirements of due process with respect to the approval of the Plan. No other or further notice is required.

B. This Court has the equitable power to approve the Plan.

C. Noble Trust served its clients in a variety of relationships. Commingling of assets was common throughout these relationships, and clients from all of the relationships were similarly situated with respect to their relationship to the ongoing fraud at Noble Trust. As a result, the Plan's provision for the pooling of assets to accomplish a ratable distribution is fair and equitable.

D. The Plan's claims classification scheme is consistent with the intent of the distribution priorities expressed in RSA 395:30, principles of equity, and the Liquidator's equitable powers.

E. Under the facts of this case, a *pro rata* distribution based on a "rising tide" methodology, as set forth in the Plan, is the most equitable method of disbursing funds to the eligible claimants.

F. The Liquidator has proposed the Plan in good faith and its proposal is an appropriate and prudent exercise of the Liquidator's judgment. The Plan is fair and equitable, reasonable, and is in the best interests of this estate and its creditors.

G. Pursuant to Section 1.11 of the Plan, the Effective Date shall be the date that this Order becomes final such that it is no longer subject to appeal, or in the event of an appeal(s), has been affirmed after all appeals therefrom have been exhausted.

H. This Court may properly retain jurisdiction over the Plan and over the matters set forth in Section 4.8 of Plan.

I. Any subsidiary findings and conclusions made by this Court on the record at the Hearing are incorporated herein by reference.

ORDERED, ADJUDGED, AND DECREED that:

1. The Plan is approved.

2. The Plan, this Order and each of their provisions shall be binding upon each creditor of Noble Trust or Aegean Scotia and every other party in interest in the Liquidation Proceeding. The provisions of the Plan and this Order, including the findings of fact and conclusions of law set forth herein, are nonseverable and mutually dependent. The failure specifically to include or refer to any particular provision of the Plan in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Plan be approved in its entirety.

3. The Liquidator reserves and retains all of his rights and powers under RSA 395 and other applicable law in connection with his administration of the Liquidation Proceeding.

4. This Court shall retain exclusive jurisdiction over the Plan and over the matters set forth in Section 4.8 of Plan.

So Ordered.

Dated: _____________ __, 2014

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Hon. Larry M. Smukler